DEPARTMENT OF STATE REVENUE

04-20110234.SLOF

Supplemental Letter of Findings: 04-20110234
Sales and Use Tax
For the Tax Years 2007-2009

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax–"Software Licenses."

Authority: IC § 6-2.5-1-27; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-5; IC § 6-2.5-13-1; IC § 6-2.5-13-2 (repealed May 3, 2007); IC § 6-8.1-5-1; Miles, Inc. v. Indiana Department of State Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); US Air, Inc., v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Supplemental Letter of Findings 04-20080413 (June 30, 2009); Letter of Findings 04-20080413 (March 25, 2009).

Taxpayer protests the imposition of use tax and/or the denial of refund of sales/use tax on its purchases of software licenses.

II. Sales and Use Tax–"Maintenance Agreements."

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-5; IC § 6-2.5-4-17; IC § 6-2.5-13-1; IC § 6-8.1-3-3; IC § 6-8.1-5-1; 45 IAC 2.2-4-2; Carroll County Rural Elec. Membership Coop. v. Dep't of State Revenue, 733 N.E.2d 44 (Ind. Tax Ct. 2000); Sales Tax Information Bulletin 2 (December 2006); Sales Tax Information Bulletin 2 (May 2002); Sales Tax Information Bulletin 2 (November 2000); Letter of Findings 04-20100606 (August 12, 2011); Letter of Findings 04-20100311 (June 29, 2011); Letter of Findings 05-0438 (August 11, 2006).

Taxpayer protests the imposition of use tax and/or the denial of refund of sales/use tax on its purchase of "maintenance agreements."

STATEMENT OF FACTS

Taxpayer is a corporation operating in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional use tax for the tax years 2007, 2008, and 2009. The Department found that Taxpayer had made a variety of purchases, including software licenses and software maintenance agreements, on which sales tax was not paid at the time of purchase nor was use tax remitted to the Department. During the audit, Taxpayer submitted a claim for a refund of $53,477 of sales tax paid during the 2007 through 2009 tax years on the ground that it had purchased software licenses and optional software maintenance agreements which were not subject to sales or use tax. On its claim for refund, Taxpayer stated that "only a portion of these [software] licenses were used in Indiana with the remaining portion being used by users located outside the state." In regard to the maintenance agreements, Taxpayer stated the agreements were not subject to sales tax because the agreements did not guarantee Taxpayer would receive software updates or upgrades. Taxpayer's refund claim was incorporated into the audit and was denied in full. Taxpayer disagreed with the audit and protested the refund denial and the imposition of use tax on certain of the software licenses and software maintenance agreements.

The Department previously issued a Letter of Findings denying Taxpayer's protest. Taxpayer requested–and the Department granted–a rehearing, and this Supplemental Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax–"Software Licenses."

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Taxpayer purchased computer software license agreements. In some instances, Taxpayer purchased one software license and in others Taxpayer purchased multiple licenses of the same computer program. During the audit, the Department found instances where Taxpayer had purchased software licenses without paying sales tax or accruing use tax at the time of purchase, and assessed use tax on the purchases. Taxpayer protests the amount of use tax that was then assessed.

Taxpayer maintains that the software license agreements "were either partially or completely utilized outside Indiana." Taxpayer asserts that since a portion of the software licenses were used on computers located outside Indiana, it would be more reasonable to allocate a portion of the purchase fees to locations outside Indiana based upon the number of users in all jurisdictions. Taxpayer states, "An accurate percentage of software license usage in Indiana can be obtained by comparing the number of global data center mailboxes assigned to Indiana locations as compared to the total number of global data center mailboxes worldwide which... using this methodology, approximately 69 [percent] of the licenses were used outside Indiana." In addition, Taxpayer asserts that its refund claim for the sales/use tax paid for certain software license purchases was incorrectly

denied. Taxpayer maintains that when this usage allocation methodology is applied to these purchases, it is entitled to a refund of 69 percent of the sales/use tax that was paid.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

IC § 6-2.5-1-27 incorporates "prewritten computer software" such as that purchased by Taxpayer in the definition of tangible personal property as follows:

"Tangible personal property" means personal property that:

(1) can be seen, weighed, measured, felt, or touched; or

(2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

Taxpayer explains that, "the intent of the law is to tax the value of only that portion of tangible personal property actually stored and used in Indiana."

Taxpayer asks that an apportioned amount of sales/use tax be refunded and that the assessment be modified to assess tax on an apportioned amount. Taxpayer's calculation is generally based upon the number of its "users" in Indiana compared to the number of "users" outside Indiana. Taxpayer's methodology consists of comparing the number of global data center mailboxes assigned to Indiana locations to the total number of global data center mailboxes worldwide. Taxpayer believes this comparison appropriately reflects the Indiana and non-Indiana usage of its various software licenses. This methodology yields approximately thirty-one percent of the software usage in Indiana and sixty-nine percent outside Indiana.

The issue is whether Taxpayer met its burden of establishing that it accepted delivery of software licenses but intended some of the licenses "for subsequent use of that property solely outside Indiana."

A. Laws Governing Sourcing

Under IC § 6-2.5-2-1, a tax, known as the gross retail tax, is imposed on retail transactions in Indiana. The gross retail tax may be referred to as "sales tax." IC § 6-2.5-13-1 provides for rules governing sourcing of transactions for sales tax.

As a threshold matter, much of Taxpayer's protest concerns transactions on which Indiana sales tax was imposed at the time of purchase (for purpose of discussion, "sales tax" refers to any taxes under IC § 6-2.5 collected by a vendor). The sourcing of transactions for sales tax are governed by IC § 6-2.5-13-1. To the extent that IC § 6-2.5-13-1 would source to Indiana sales on which Taxpayer remitted Indiana sales tax, Taxpayer's protest is denied. Any further discussion assumes that Indiana use tax (i.e., not paid by Taxpayer to the vendor) is properly at issue.

Taxpayer makes an argument that the software licenses–or an allocated portion of single software licenses–should be exempted based on the argument "that the courts have previously confirmed that the legislative intent is to tax only the portion of tangible personal property actually stored and used in Indiana." In particular, Taxpayer cites to Miles, Inc. v. Indiana Department of State Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995) as follows:

> If property is stored in Indiana for subsequent use outside Indiana, then the activities of storing, handling, and transporting the property cannot be taxed as "uses." To hold otherwise would subsume "storage" within "use" and nullify the exception for subsequent use outside Indiana. Id. at 1164.

IC § 6-2.5-3-2 states that "[a]n excise tax, known as the use tax, is imposed on the storage, use or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction...." (Emphasis added). However, Indiana law provides a "temporary storage" use tax exemption under IC § 6-2.5-3-1(b) which states:

> "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

Prior to May 3, 2007, IC § 6-2.5-13-2 was in effect. IC § 6-2.5-13-2 provided that a business purchaser–such as Taxpayer–could provide a software seller with a multiple points of use ("MPU") exemption form, which would permit apportioning the software's purchase price based on the location of the purchaser's users. The purchaser would remit use tax based upon each jurisdiction's respective apportioned portion of the price. In the alternative, if the purchaser was a direct pay permit holder, the purchaser could also avail itself of these apportionment and remittance provisions.

After the repeal of IC § 6-2.5-13-2, the MPU exemption provisions were no longer in effect. Thus, the software sales are sourced based on Indiana statutes and/or case law.

In this case, Taxpayer did not provide evidence of issuing MPU exemption forms or direct pay permits. Thus, Taxpayer could not avail itself of the MPU exemption provisions under IC § 6-2.5-13-2 for any portion of the tax periods of this protest.

Taxpayer points to Letter of Findings 04-20080413 (March 25, 2009) and Supplemental Letter of Findings 04-20080413 (June 30, 2009), as supporting its position that it is entitled to a refund of sales tax on the multiple

license purchases, but the finding in those Letters of Findings was more narrow than Taxpayer suggests, as follows:

> However, while the information provided by Taxpayer was insufficient to demonstrate the full extent of Taxpayer's assertion, the information provided by Taxpayer did show that certain of the software/licenses purchases were not subject to Indiana use tax. Therefore, Taxpayer has provided sufficient documentation to demonstrate that the following purchases... are not subject to Indiana use tax....

At rehearing, Taxpayer provided a proposed breakdown of software use by category. In particular, Taxpayer provided breakdowns by four categories of software.

B. Large Number of Multiple Licenses

The first category of software is software used by all of Taxpayer's computer users or a substantial percentage of all those users (for instance, Microsoft Office applications). The number of licenses purchased for these items appear to comport with Taxpayer's actual employees or, if more than the number of employees, a reasonable number of future employees.

For the first category of software, the use–and location of use of this software–by Taxpayer's employees can generally be readily determined if the software is stored locally (i.e., on the user's hard drive). For these licenses, Taxpayer has provided sufficient information to conclude that a portion of the licenses were used by employees outside Indiana. For applications that are locally stored, Taxpayer has provided sufficient information to conclude that a portion of these licenses were not used in Indiana within the meaning of IC § 6-2.5-3-1.

However, the Department cannot accept that the percentage of usage outside Indiana is the sixty-nine percent referenced by Taxpayer. The absolute number of licenses used outside the Indiana is not subject to Indiana sales and use tax. However, because Taxpayer's commercial domicile is Indiana, any unused licenses were delivered to Indiana and were "used" in Indiana within the meaning of IC § 6-2.5-3-2. Thus, Taxpayer's burden includes providing evidence sufficient to show how Taxpayer stores the subject software. If the software is locally in Indiana or the license is unused, the license is taxable for Indiana sales and use tax purposes. Taxpayer is sustained in part and denied in part subject to supplemental audit.

C. Small Number of Multiple Licenses

The second category is multiple license software for specific categories of employees. Taxpayer purchased multiple (but less than one hundred) licenses for each listed item. This second category generally consists of Oracle-based applications. These applications are server-based applications.

In this case, Taxpayer's primary server is based in Indiana. For the licenses associated with the software stored on an Indiana-based server, the storage of the software on an Indiana-based server is a "use" of the software in Indiana subject to use tax under IC § 6-2.5-3-2. See US Air, Inc., v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468-69 (Ind. Tax Ct. 1993).

D. IT Troubleshooting Software

The third category consists of troubleshooting software. For three of the four items, Taxpayer purchased one license. For a fourth item, Taxpayer purchased multiple licenses.

For this category of software, for single software licenses, Taxpayer has provided sufficient information to conclude that the software is stored on a server located outside Indiana and is designed for all computers in Taxpayer's networks, Taxpayer is not subject to Indiana use tax on a portion of the software that is not used in Indiana. However, Taxpayer is subject to Indiana use tax on the portion equal to Taxpayer's Indiana computers compared to Taxpayer's overall computers.

For the software with multiple licenses, Taxpayer has provided sufficient information to conclude that the software is stored on a server located outside Indiana. Based on the fact that the software is designed for all computers in Taxpayer's networks, Taxpayer is not subject to Indiana use tax on a portion of the software. Taxpayer is subject to Indiana use tax on the portion equal to Taxpayer's Indiana computers compared to Taxpayer's overall computers.

However, Taxpayer has stated that three of the four charges listed under this category are not for software but rather for training, education, and similar services. In other words, Taxpayer argues that these charges represent costs for services. Taxpayer has not provided sufficient information to categorically accept Taxpayer's assertions. However, Taxpayer has provided sufficient information to justify further review of its contentions. Taxpayer's contentions shall be reviewed in a supplemental audit as provided in Subpart F.

E. Application Software

The fourth category consists of application software. These are security programs and server host programs. Taxpayer purchased between one and one hundred licenses for the listed software.

In this case, Taxpayer's server is based in Indiana. For the licenses associated with the software stored on an Indiana-based server, the storage of the software on an Indiana-based server is a "use" of the software in Indiana subject to use tax under IC § 6-2.5-3-2. Taxpayer has not provided information to conclude that this software was located on servers outside Indiana; thus, Taxpayer's protest is denied with regard to this software.

F. Determination of Taxability of Software

The Department has been provided a proposed breakdown of Taxpayer's software usage. The Department is unable to accept the breakdown provided by Taxpayer based on the currently-available information.

Issuance of this Letter of Findings will allow Taxpayer to provide the Department's auditor with information substantiating the number of users in Indiana and users everywhere for the items stored locally on users' computers. For server-based software, Taxpayer is to provide the Department's auditor with information substantiating the number of computers in Indiana and computers everywhere. Taxpayer will have thirty (30) days following the Department's issuance of this Letter of Findings to provide this information, unless Taxpayer and the Department's auditor agree to additional time. If the information is not provided or is insufficient to permit the Department to conclude that the property in question is exempt, Taxpayer's protest will be deemed denied to the extent of the information not provided or that is inadequate.

Once the Department receives this additional information, the Department shall apply the user information in accordance with the determination as provided in subparts A, B, and D above. Further, if Taxpayer can demonstrate that it remitted use tax to another state on an item on which the Department assessed use tax, Taxpayer shall be permitted credit for use tax on that item as provided under IC § 6-2.5-3-5.

FINDING

Taxpayer's protest of sales tax paid on software purchases is denied to the extent the software is sourced to Indiana under IC § 6-2.5-13-1. Taxpayer's protest to the imposition of use tax and/or denial of refund of sales/use tax is otherwise sustained in part and denied in part and subject to Audit Review.

II. Sales and Use Tax–"Maintenance Agreements."

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Taxpayer purchased various software "maintenance agreements." During the audit, the Department found instances where Taxpayer had purchased software "maintenance agreements" without paying sales tax at the time of purchase, and assessed use tax on the purchases. Also, during the audit, Taxpayer filed a refund claim stating that the software "maintenance agreements" were not subject to sales/use tax because the agreements did not guarantee Taxpayer would receive software updates or upgrades. Taxpayer's refund claim was incorporated into the audit and was denied in full.

Taxpayer maintains that since the software "maintenance agreements" do not contain a provision which guaranteed that Taxpayer would automatically receive software updates and upgrades, the software "maintenance agreements" are not subject to Indiana sales/use tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

In support of its position that the transactions are not subject to sales/use tax, Taxpayer points to 45 IAC 2.2-4-2(a) which states:

> Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax....

Taxpayer also points to Sales Tax Information Bulletin 2 (May 2002), 25 Ind. Reg. 3595, as "outlin[ing] the position of the Legislature and the Department regarding optional maintenance agreements." This earlier version of Sales Tax Information Bulletin 2 stated as follows:

> Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are not subject to sales tax. Any parts or tangible personal property supplied pursuant to this type of agreement are subject to use tax. Sales Tax Information Bulletin 2 (May 2002) (Emphasis Added). See also Sales Tax Information Bulletin 2 (November 2000), 24 Ind. Reg. 1192 ("Optional warranties and maintenance agreements that only contain the intangible right to have property supplied and there is no certainty that property will be supplied are not subject to sales tax.").

Taxpayer acknowledges that the Department subsequently amended the information bulletin, which revised the Department's position. That revision states:

> Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided. Any parts or tangible personal property supplied pursuant to this type of agreement are not subject to sales or use tax. Information Bulletin 2 (December 2006) (Emphasis Added).

Taxpayer relies on the May 2002 Information Bulletin as supporting its position that its maintenance agreements are exempt from sales tax because the maintenance agreements it purchased purportedly do not contain the right to obtain updates. Taxpayer challenges the position taken in the revised December 2006 Information Bulletin because the Department did not promulgate an accompanying regulation. Taxpayer cites to IC § 6-8.1-3-3 which requires as follows:

> (a) The department shall adopt, under IC 4-22-2, rules governing:
>
> (1) the administration, collection, and enforcement of the listed taxes;
>
> (2) **the interpretation of the statutes governing the listed taxes**;
>
> (3) the procedures relating to the listed taxes; and

(4) the methods of valuing the items subject to the listed taxes.

(b) **No change in the department's interpretation of a listed tax may take effect before the date the change is:**

(1) adopted in a rule under this section; or

(2) **published in the Indiana Register** under IC 4-22-7-7(a)(5), if IC 4-22-2 does not require the interpretation to be adopted as a rule; if the change would increase a taxpayer's liability for a listed tax.

(**Emphasis Added**).

IC § 6-8.1-3-3 states that if the Department changes its "interpretation of a listed tax," it must either adopt a rule (regulation) under IC § 4-22-2 or give notice of that interpretation in the Indiana Register.

Taxpayer correctly points out that the Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA, was not published in the Indiana Register until August 2010.

The previous 2002 version of the Information Bulletin did not require the vendor to collect sales tax on the sale of the extended warranties and maintenance agreements; however the vendor was required to self-assess use tax on any parts supplied pursuant to the terms of the warranty or agreement. The subsequent version of the Information Bulletin (2006) essentially reversed that requirement. The vendor was required to collect sales tax on the sale of the warranty but was not required to self-assess use tax on any parts supplied pursuant to the terms of the warranty. Presumably the subsequent version of Information Bulletin (2006) was a "change in the department's interpretation of a listed tax" as described in IC § 6-8.1-3-3 and triggered the Department's obligation to either adopt a regulation or publish notice of that "change" in the Indiana Register.

However, the Department must point out that prior to the issuance of the Information Bulletin 2 (December 2006), the Department issued Letter of Findings 05-0438 (August 11, 2006), 20061101 Ind. Reg. 045060474NRA, in which the Department addressed the question of whether "Software Maintenance Agreements" were subject to sales tax. The Department found that these agreements were subject to sales tax on a "prospective basis" as follows:

> There is no regulation that sets out the department's position regarding the application of sales and use tax to optional warranties. The department first issued Sales Tax Information Bulletin [] 2 concerning Optional Warranties... on May 2, 1983. In that Information Bulletin, the department explained that if there was a possibility that no tangible personal property would be transferred with the warranty, then there was no certainty that there would be a retail sale and the sales and related use tax did not apply. This position was restated in the revised Sales Tax Division Information Bulletins issued in August 1991, November 2000, and May 2002. Each of the revisions restated the general rule. In the May 2002 revision, it was stated "[o]ptional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are not subject to sales tax." Each of the revisions also gave a specific example concerning computer software situations. The examples stated that sales and use tax would apply to the sale of an optional warranty or maintenance agreement in the software situation only if there was a guarantee of the transfer of tangible personal property (updates) pursuant to the agreement.
>
> Computer technology and use has evolved since the issuance of the first Sales Tax Information Bulletin [] 2 on May 2, 1983. Almost all software optional warranties and software maintenance agreements sold today include the automatic provision of updates-sometimes on a day-by-day or week-by-week basis. Purchasers of these agreements have a reasonable expectation that they will receive the updates whether or not the actual contract couches the provision of updates as "optional." The substance of the agreements is that tangible personal property in the form of software updates will be provided no matter what the language of the contract says. The department determines tax consequences by construing the substance of the agreement over the form. Wholesalers, Inc. v. Indiana Department of State Revenue, 597 N.E.2d 1339 (Ind. Tax 1992). In the case of software maintenance agreements or optional warranties, it is clear that the parties presume that tangible personal property in the form of updates will be transferred. Therefore, **the department will construe software maintenance agreements and optional agreements as presumed to be subject to the sales and use tax.** A taxpayer could rebut this presumption by demonstrating that no updates were actually received pursuant to a particular maintenance agreement or optional warranty.
>
> In this particular taxpayer's situation, the department will apply this interpretation prospectively. (Published in the Indiana Register and available at http://www.in.gov/legislative/iac/20061101-IR-045060474NRA.xml.html) (**Emphasis added**).

As of the publication of Letter of Findings 05-0438 the Department fulfilled its obligation to give notice of its "change of interpretation" concerning the taxability of software maintenance agreements. As summarized in the Letter of Findings, "The taxpayer's protest is sustained as to the maintenance agreements and optional warranties in this assessment. The taxpayer is advised that in the future, there will be a rebuttable presumption that all software maintenance agreements and optional warranties will be subject to the sales and use taxes."

In the case of the software maintenance agreements, the interpretations set out in the Sales Tax Information Bulletins are irrelevant. Instead, the interpretation set out in the August 2006 Letter of Findings governs the issue. The publication of that Letter of Findings met the requirements set out in IC § 6-8.1-3-3. See Carroll County Rural Elec. Membership Coop. v. Dep't of State Revenue, 733 N.E.2d 44, 49 n.5 (Ind. Tax Ct. 2000) ("The publication of

the Letter of Findings is a prerequisite for the Department before it can change its position as to the interpretation of a tax, where the change would increase the taxpayer's liability.")

However, Taxpayer also points out that the Department issued two additional Letters of Findings, Letter of Findings 04-20100606 (August 12, 2011), 20111026 Ind. Reg. 045110638NRA, and Letter of Findings 04-20100311 (June 29, 2011), 20110928 Ind. Reg. 045110489NRA, which sustained protests related to optional maintenance agreements. Taxpayer states that "[t]he Taxpayer's situation is **identical** to the taxpayers in [the two Letters of Findings]." **(Emphasis** in original).

However, the Department cannot agree with Taxpayer's conclusion that the taxpayers' respective situations in the two cited Letters of Findings are identical to Taxpayer. In Letter of Findings 04-20100606, the agreements in question were automobile warranties. In Letter of Findings 04-20100311, the agreement was a warranty contract on a laptop computer. These Letters of Findings relied upon the lack of publication of Sales Tax Information Bulletin 2 (December 2006) to conclude that the May 2002 version of Sales Tax Information Bulletin 2 controlled for their respective taxpayers.

A timeline of the history of various warranties, maintenance contracts, and the Department's interpretations governing those agreements is useful. In 2002, the Department published Sales Tax Information Bulletin 2 (May 2002). Under this Information Bulletin, software maintenance agreements and other tangible personal property warranties were generally not subject to tax. This was consistent with pre-2002 Department practice and remained the Department's policy until August 2006.

In August 2006, the Department issued Letter of Findings 05-0438. Effective in August 2006, the Department posited that–on a going-forward basis–software maintenance agreements were presumed to provide tangible personal property and, therefore, taxable unless the taxpayer provided evidence to the contrary. However, maintenance agreements and warranties for other tangible personal property still followed the tax treatment pursuant to the May 2002 version of Sales Tax Information Bulletin 2.

During the intervening months from August 2006 to December 2006, the Department altered its historical position on all maintenance contracts and warranties and concluded that such contracts were presumed to be subject to tax. To reflect the revised presumptive treatment, the Department issued Sales Tax Information Bulletin 2 (December 2006). Sales Tax Information Bulletin 2 (December 2006) was published on the Department's own internet site but was not published in the Indiana Register. The Department did not discover the lack of publication until the summer of 2010.

The effect of not publishing Sales Tax Information Bulletin 2 (December 2006) was that the Department's position from August 2006 was unchanged until proper publication of Sales Tax Information Bulletin 2 (December 2006) in August 2010. Thus, from December 2006 to August 2010, the Department's stance was unchanged from the August 2006 stance because the Department had not effectively published Sales Tax Information Bulletin 2 (December 2006).

Nevertheless, the Department assessed the taxpayers in Letter of Findings 04-20100606 and Letter of Findings 04-20100311 as if Sales Tax Information Bulletin 2 (December 2006) had been properly published. These Letters of Findings reflected the Department's interpretation as of August 2006, in which the Department had not extended the reasoning of Letter of Findings 05-0438 beyond software maintenance agreements. However, the taxability of software maintenance agreements remained a narrow exception to the presumed nontaxability of other tangible personal property maintenance agreements. Taxpayer's case involves software maintenance agreements, not other warranties on tangible personal property.

Taxpayer further maintains that software maintenance agreements were not subject to Indiana sales/use tax until the enactment of IC § 6-2.5-4-17 on July 1, 2010, which provides that "a person is a retail merchant making a retail transaction when the person enters into a computer software maintenance contract to provide future updates or upgrades to computer software."

However, the Department must disagree. As discussed previously, the Department has consistently found that software maintenance agreements were potentially subject to sales and use tax prior to the enactment of this legislation. Therefore, even when Taxpayer's argument–that this legislation changed the law–is presumed correct, a change from the current law would be changing the law from making software maintenance agreements subject to tax with a rebuttable presumption to making software maintenance agreements always subject to tax without the availability of a rebuttable presumption.

Even though the Department has determined that the software maintenance agreements are taxable, software maintenance agreements are taxable only to the extent that the underlying software is used in Indiana as provided in Issue I above or Taxpayer remitted sales tax on a maintenance contract for software sourced to Indiana under IC § 6-2.5-13-1. Further, if Taxpayer can demonstrate that it remitted use tax to another state on an item on which the Department assessed use tax, Taxpayer shall be permitted credit for use tax on that item as provided under IC § 6-2.5-3-5.

Taxpayer raises other contentions regarding the propriety of the Department's ruling in the previous Letter of Findings related to this Taxpayer. While the Department recognizes Taxpayer's concerns, Taxpayer's assertions do not provide sufficient legal or factual grounds for the Department to determine that the proposed assessment was incorrect.

FINDING

Taxpayer's protest to the imposition of use tax and/or denial of refund of sales/use tax for its purchases of software "maintenance agreements" is sustained in part and denied in part as provided herein.

SUMMARY

Taxpayer's protest, as discussed in Issue I and Issue II, is sustained in part and denied in part.

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